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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARVELLO TUFONO, Defendant and Appellant.	F069908 (Super. Ct. No. CRM023280) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Arvello Tufono was charged with first degree burglary in violation of Penal Code section 459 (count 1),[1] resisting an executive officer in violation of section 69 (count 2), and dissuading a witness from testifying in violation of section 136.1, subdivision (a)(1), (count 3). It was further alleged that defendant had a prior serious felony and strike conviction (§§ 667, subds. (a)–(i), 1170.12, subds. (a)–(d), 668), and served a prior prison term (§ 667.5, subd. (b)). Defendant was convicted by a jury on counts 1 and 2 and acquitted on count 3, and he thereafter admitted the prior serious felony and strike conviction and the prior prison term allegations. Defendant was sentenced to four years on count 1 (lower term of two years, doubled); one year, four months on count 2 (one-third of midterm of eight months, doubled), to be served consecutively; one year for the prior prison term; and five years for the strike conviction, resulting in a total prison term of 11 years 4 months.

On appeal, defendant challenges (1) the prosecution's amendment of the information to charge the prior prison term, (2) the imposition of sentences for both the prior serious felony enhancement and the prior prison term enhancement, (3) the denial of his *Romero* request to strike his prior serious felony conviction, and (4) the calculation of his credits for jail time served.[2] The People concede it was error to sentence defendant for both the prior serious felony enhancement and the prior prison term enhancement. We accept that concession and affirm the judgment in all other respects.

SUMMARY OF FACTS

In 2004, defendant was convicted of second degree robbery with use of a firearm. (§§ 211, 12022.5, subd. (a).) He was 17 years old at the time of that crime. On June 8, 2012, while on parole for the robbery, defendant was arrested for breaking into an apartment and stealing various items. During the course of his arrest, he struggled with

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1 All other statutory references are to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530-531 (*Romero*).

officers, leading to the charges in count 1 and count 2 of which he was convicted. In December 2012, defendant allegedly threatened a witness, leading to the charge in count 3 of which he was acquitted.

DISCUSSION

I. Amendment of Information to Allege Prior Serious Felony Enhancement

On the first day of trial prior to the commencement of jury selection, the prosecutor moved to amend the first amended information to allege a prior serious felony enhancement (§ 667, subd. (a)(1)). Defendant's trial counsel did not object and the trial court granted the motion. On appeal, defendant argues the trial court abused its discretion in granting the motion and the amendment violated his right to due process.[3] Defendant also argues his trial counsel's failure to object during trial did not result in forfeiture of his claim. In response, the People contend the trial court did not abuse its discretion in permitting the amendment, but do not address the separate due process argument or the forfeiture argument.[4]

A. Forfeiture of Claim on Appeal

Defendant's trial counsel did not object to the prosecutor's motion to amend the information to add the enhancement, instead stating he was well aware of it and had anticipated it. "The forfeiture doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court.' Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.'"

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[3] The second amended complaint was amended a third time during trial. That amendment is not at issue in this appeal.

[4] We reject defendant's suggestion that the People's failure to respond to some arguments is a concession to the validity of those arguments. (*People v. Hill* (1993) 3 Cal.4th 959, 995, fn. 3, overruled in part on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

(*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Defendant's failure to object to the amendment in the trial court forfeits this claim on appeal and we find his arguments to the contrary unpersuasive. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 481–484; cf. *People v. Valladoli* (1996) 13 Cal.4th 590, 606 (*Valladoli*) [facial constitutional challenge to statute permitting amendment to indictment or information arguably properly raised despite failure to object in trial court].)

B. Amendment Comported with Due Process Requirements

Alternatively, on the merits of the issue, we find the trial court did not err in granting the prosecution's motion.

Motions to amend are reviewed for abuse of discretion. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.) "This standard is deferential. [Citations.] But it is not empty.… [I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

The amendment of the information at issue here is controlled by section 969a, which provides in relevant part, "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions, and if such amendment is made it shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary." Trial judges have discretion under the statute "to permit or deny the amendment [citation], and we rely in such matters on the prudent exercise of that discretion to ensure the due process rights of criminal defendants are adequately protected. In exercising such discretion, courts should scrutinize (i) the reason for the late amendment, (ii) whether the defendant is surprised by the belated attempt to amend, (iii) whether the prosecution's initial failure to allege the prior convictions affected the defendant's decisions during plea bargaining, if any,

(iv) whether other prior felony convictions had been charged originally, and (v) whether the jury has already been discharged (see § 1025). This list … is intended to be illustrative rather than exhaustive …." (*Valladoli*, *supra*, 13 Cal.4th at pp. 607–608, fn. omitted.)

In this case, there is no indication in the record the prosecution held back the enhancement "to gain some tactical advantage" or the delay negatively impacted any plea bargain negotiations, nor does defendant contend otherwise. (*Valladoli*, *supra*, 13 Cal.4th at p 608.) Moreover, the amendment was of no surprise to defendant. (*Id.* at pp. 607–608.) Trial counsel was aware of the enhancement, as the same underlying conviction formed the basis for the other enhancements alleged, and he anticipated the amendment. Finally, the motion to amend was brought prior to the commencement of trial without objection. Under these circumstances, the trial court was well within its discretion to grant the motion to amend the information. (*Ibid.*)

Defendant's contention the trial court abused its discretion because it failed to exercise its discretion lacks support. *People v. Lettice* (2013) 221 Cal.App.4th 139, cited by defendant, is of no assistance to him, as it involved a situation in which the prosecution did not obtain permission to file the amended information, and the trial court was under the misimpression it was required to file it. (*Id.* at pp. 151–152.) Here, conversely, the prosecution brought a motion and the trial court heard from defendant's trial counsel before granting the motion. That the court remarked it thought the prosecution was free to amend to add the allegation does not translate to a misbelief that it lacked discretion to grant or deny the motion. To the contrary, the court expressly discussed the amendment with the parties, found no prejudice to defendant, and granted the motion.

Finally, defendant separately argues at length that in addition to the trial court abusing its discretion in granting the motion to amend, the amendment violated his right to due process, and we should apply the "elements test" and the "accusatory pleading

test" to determine whether the amendment satisfied due process. (*In re A.L.* (2015) 233 Cal.App.4th 496, 502–503.) Defendant contends due process is not "trump[ed]" by section 969a.

"[A] defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) However, in *Valladoli*, the California Supreme Court found section 969a permitted the prosecution to amend the information after the jury rendered a verdict but before it was discharged and the statute did not violate the right to due process. (*Valladoli*, *supra*, 13 Cal.4th at pp. 605–608.) In this case, due process was clearly satisfied by virtue of the prosecution's motion to amend in compliance with section 969a and consideration of the factors articulated in *Valladoli*. Defendant's reliance on *In re A.L.*, *supra*, 233 Cal.App.4th 496 to support his position is misplaced. In that case, during closing argument, the prosecutor moved to amend the juvenile petition to substitute a weapon enhancement for personal use of a firearm (§ 12022, subd. (b)) with a weapon enhancement for use of a firearm by a principal (§ 12022, subd. (a)), after the trial court noted the lack of evidence supporting personal use of a firearm. (*In re A.L.*, *supra*, at pp. 499, 504.) The juvenile's trial counsel objected and argued the defense case was presented with the understanding that only the charged enhancement for personal use of a firearm was at issue. (*Id.* at p. 499.) The trial court found there was no unfair surprise or prejudice and granted the motion to substitute the enhancement. (*Ibid.*) While the Court of Appeal ultimately concluded there was no due process violation, it employed the "elements test" and the "accusatory pleading test" in analyzing whether the enhancement for use of a firearm by a principal was a lesser included offense of the enhancement for personal use of a firearm. (*Id.* at pp. 502–504.)

The circumstances of this case are not analogous to those at issue in *In re A.L.*, nor are they analogous to those at issue in *People v. Haskin* (1992) 4 Cal.App.4th 1434, also

cited by defendant.[5] Although the amendment to the information was made on the first day of trial, we reiterate it occurred prior to the commencement of jury selection, the same underlying conviction already formed the basis for the other two previously alleged enhancements, there were no new facts involved and, critically, defendant was neither unfairly surprised nor prejudiced. In sum, the amendment at issue did not deprive defendant of adequate notice and the opportunity to prepare an intelligent defense, in violation of due process. (*Valladoli*, *supra*, 13 Cal.4th at pp. 606–607; *In re A.L.*, *supra*, 233 Cal.App.4th at p. 499; *People v. Haskin*, *supra*, at p. 1438; *People v. Tindall* (2000) 24 Cal.4th 767, 776.) We reject defendant's argument to the contrary. (§ 969a; *Valladoli*, *supra*, at p. 608.)

II. Imposition of Sentences for Prior Serious Felony and Prior Prison Term Enhancements

Next, defendant argues the trial court erred in imposing sentences under both section 667.5, subdivision (b), and section 667, subdivision (a)(1). The People concede the two enhancements cannot be applied to the same prior offense and only the greater enhancement under section 667, subdivision (a)(1), applies.

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) The sentence enhancements in this case all arise from the same underlying robbery conviction and the trial court therefore erred in sentencing defendant to both five years under section 667, subdivision (a)(1), and one year under section 667.5, subdivision (b). The greater

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5 In *People v. Haskin*, *supra*, 4 Cal.App.4th at pages 1437 and 1440, the defendant admitted a one-year sentence enhancement, after which the trial court proceeded to impose a five-year sentence under a substituted enhancement the defendant had not been statutorily or factually charged with. The Court of Appeal noted, "[I]t should be obvious that a court cannot accept a guilty plea or admission from a defendant, and thereafter accept evidence or make findings that change the character of the crime or enhancement admitted so as to increase the authorized punishment therefor." (*Id.* at p. 1440.)

enhancement applies, resulting in the imposition of only the five-year enhancement. The one-year enhancement shall be stricken. (*People v. Jones*, *supra*, at p. 1153.)

III. Denial of *Romero* Request to Strike Prior Robbery Conviction

Defendant filed a *Romero* petition requesting dismissal of his prior robbery conviction and he argues the trial court erred in declining to do so. Defendant contends the court was required to strike his robbery conviction pursuant to *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). Alternatively, defendant contends the court nevertheless abused its discretion in declining to strike the conviction. We find both arguments unpersuasive.

Pursuant to section 1385, trial courts have the discretion to strike prior felony convictions, either on their own motion or on request by the prosecution. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) A defendant is not entitled to make a motion to strike a conviction, but may invite the court to do so. (*Id.* at p. 375.) A trial court's denial of a defendant's invitation to strike a conviction is reviewed for abuse of discretion. (*Id.* at pp. 373–374.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it" (*id.* at p. 377) and "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances" (*id.* at p. 378).

With respect to defendant's argument under *Vargas*, the California Supreme Court held "the nature and circumstances of defendant's prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes law." (*Vargas*, 59 Cal.4th at p. 649.) The issue considered in *Vargas* was the "extraordinary" situation in which a defendant had two strike convictions based on the same underlying criminal act and the facts "demonstrate[d] that no reasonable person would disagree that defendant fell outside the spirit of the Three Strikes law." (*Id.* at pp. 641–642.) In this case, defendant had one prior felony conviction arising from one underlying crime: the 2002 robbery. As this

case does not involve the issue of two felony convictions arising from the same acts, *Vargas* is inapplicable and we reject defendant's argument that *Vargas* compels his conviction be stricken.

We also find defendant's alternative argument unavailing. In considering whether to strike a conviction, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

Defendant's petition inviting the trial court to strike his robbery conviction set forth the bases for his request, including his young age at the time of the crime (17) and his history of mental health and drug abuse issues. Trial counsel argued "[t]hese factors are highly mitigating and place [defendant] outside the spirit of the '3 Strikes' law." The trial court affirmatively acknowledged reviewing the written request and reading all of the documents.

After trial counsel argued the motion during the sentencing hearing, the court declined the invitation to strike the conviction. Defendant was tried as an adult in 2002 for second degree robbery with the use of a firearm, and he was sentenced to eight years in prison. Defendant committed the offenses at issue in this appeal while on parole for the robbery conviction and, at the time of his arrest, he was a parolee at large with a warrant out for his arrest. In 2013, defendant was convicted of a misdemeanor charge of resisting, delaying or obstructing an officer and a misdemeanor charge of resisting an executive officer. He served jail time as a result of those convictions. The trial court found defendant did not fall outside the spirit of the Three Strikes law and doubted it "could articulate a valid basis for striking the strike that [would] stand appellate review."

The trial court was not required to articulate any reason for declining defendant's invitation to strike the conviction. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 376; accord, *In re Coley* (2012) 55 Cal.4th 524, 560–561.) "The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law." (*People v. Carmony*, *supra*, at p. 376.) Conversely, the trial court would have been required to articulate a reason had it elected to strike the conviction. As such, the trial court's comment in this case that it did not believe it could articulate a basis for striking the conviction casts no suspicion on its decision not to strike the robbery conviction. (*Ibid.*) The comment merely reflected the court's opinion that defendant did not fall outside the spirit of the Three Strikes law and it would be difficult for the court to articulate a basis for striking the conviction. The court was well within its discretion to form the opinion defendant did not qualify to have his conviction stricken and defendant's disagreement with that opinion does not suffice to meet his burden, as "'[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations." (*People v. Carmony*, *supra*, at p. 378.)

Further, we find the record does not support defendant's argument that the trial court did not exercise "'"informed discretion."'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) There is nothing "extraordinary" about this case and the trial court did not abuse its discretion in declining defendant's invitation to strike his 2004 robbery conviction. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

IV. Calculation of Custody Credits for Jail Time Served

Finally, defendant argues he was improperly denied credits for the period of June 8, 2012, the date of his arrest, through September 24, 2012, the date of his release on bail. The People maintain he was not entitled to any credit for that time period because he was in custody in part for a parole violation.

Pursuant to section 2900.5, subdivision (b), defendant is entitled to the presentence custody credits at issue "'*only* where the custody to be credited is attributable to proceedings related to the *same conduct* for which the defendant has been convicted ….'" (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180.) "[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was 'a' basis for the revocation matter as well." (*Id.* at pp. 1193–1194.)

Defendant bears the burden of demonstrating "that the conduct that led to his conviction was the sole reason for his presentence confinement." (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1259.) He has not done so. Defendant was a parolee at large with an outstanding arrest warrant at the time of his apprehension for the apartment burglary, and that status was ascertained incident to his apprehension. A parole hold was placed on defendant, and the probation report documented defendant earned no credits between June 8, 2012, and September 24, 2012, because he was in custody on a parole violation. On this record, defendant has not met his burden of showing "'but for'" his arrest for the burglary, he would not have been in jail. (*People v. Bruner*, *supra*, 9 Cal.4th at pp. 1180, 1194, 1195.) That defendant was arrested as a direct result of the burglary he committed on June 8, 2012, does not alter the fact he had an outstanding warrant for his arrest unrelated to the burglary and he was held in custody in part as a parole violator. (*Id.* at pp. 1180–1181; *People v. Shabazz*, *supra*, at pp. 1258–1259.) Defendant's argument to the contrary is unpersuasive.

DISPOSITION

This matter is remanded to the trial court for the limited purpose of striking the one-year enhancement to defendant's sentence pursuant to section 667.5, subdivision (b). The judgment is affirmed in all other respects.

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KANE, Acting P.J.

WE CONCUR:

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DETJEN, J.

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PEÑA, J.